IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CRIMINAL APPEALLTE JURISDICTION.

CRIMINAL APPEAL NO. 314 OF 1997

1. Sukhdev Hindurao Patil
2. Sulochana Hindurao Patil
3. Sou.Shalan Hindurao Patil
4. Hindurao Bhau Patil
5. Dattatraya Hindurao Patil..... ....Appellants.
(Orig.Accd.)

V/s

The State of Maharashtra .... Respondents.

Mr.S. A. Ingawale, Adv. for the appellants.

Mr.A. S.Shitole, APP for the State.

CORAM: V.G. PALSHIKAR
AND
R.C. CHAVAN, JJ.

24th June, 2005.

ORAL JUDGMENT: (Per Palshikar, J.)

Being aggrieved by the judgment and order of conviction and sentence passed by the learned III Additional Sessions Judge, Kolhapur in Sessions Case No.201 of 1996 on 12.5.1997 the appellants-accused have preferred this appeal on the grounds mentioned in the memo of appeal as also verbally canvassed before us.

2. With the assistance of the learned Advocate for the appellants as also the learned Public Prosecutor we have scrutinized the entire evidence on and reappreciated the same.

3. The prosecution case as disclosed by reappreciation of evidence stated briefly is that Sukhdeo Hindurao Patil was married to Kanchan sometime in the year 1995. The prosecution alleged that soon after the marriage Kanchan was harassed and tortured by her in-laws for getting additional dowry. On 21.8.1995 a report was lodged at the Kagal police station by the complainant Vishnu Ghatage that his daughter is missing. Thereafter the complainant received information that there was a dead body of a woman floating in the river Vedganga. He along with others went to the spot, saw the dead body and identified it as that of Kanchan. Accordingly the complaint in the Bhivashi police station was prepared. Eventually during the investigation the accused persons were arrested and prosecuted in Sessions Case No.201 of 1996. The prosecution examined eight witnesses to prove its case that Kanchan was murdered by accused Nos.1 to 5 with the common intention for not getting adequate or more dowry after her marriage. The learned Judge accepted the evidence as led by the prosecution and convicted all the accused persons under section 302 read with section 34 of Indian Penal Code to suffer imprisonment for

life. It is this order which is impugned in this appeal by all the five accused.

4. Before we proceed to deal with the matter and contentions raised by the learned counsel on both sides it is necessary and important to note the first and most vital submission made by Shri Ingawale on behalf of the appellants-accused. He has submitted that the conviction of accused Nos.4 and 5 under section 302 of Indian Penal Code read with section 34 of Indian Penal Code was unsustainable in law as there was no charge under section 302 against accused Nos.4 and 5. He substantiated to the point by pointing out the charge which is at Ex.2 and the observations of the learned Judge in the judgment. The charge at page 2 reads as under :

"I Shri B. T. Narwade, IIIrd Additional Sessions Judge, Kolhapur do hereby charge you:

1. Sukhdev Hindurao Patil, age 27 yrs.
2. Sulochana Hindurao Patil, aged: 35 yrs.
3. Sou.Shalan Hindurao Patil, aged 60 yrs.
4. Hindurao Bhau Patil, aged 70 yrs.
5. Dattatray Hindurao Patil aged 23 yrs.

All are resident of Mhakve, Tal. Kagal, Dist: Kolhapur.

as follows:

That you accused No.1 being husband of deceased Sou.Baby alias Kanchan, you accused No.2 being sister of accused No.1, you

accused Nos.3 and 4 being mother and father of accused No.1 and you accused No.5 being brother of accused No.1, that you all accused above named, individually or in the alternative in furtherance of the common intention of you all, at your house at village Mhakve, Tal.Kagal, Dist. Kolhapur within the period of 27.5.94 to 19.8.1995., subjected the said Sou.Baby alias Kanchan to cruelty by your willful conduct by demanding from her parents amount of Rs.20,000/- and golden ornaments and harassed her by beating and abusing, and thereby you have committed an offence punishable under section 498-A simpliciter or in the alternative under section 498-A read with section 34 of the Indian Penal Code and within my cognizance.

That you accused Nos.1 to 3 above named, on 19.8.1995 at about 5.00 a.m. In your house at village Mhakve, Tal. Kagal, Dist. Kolhapur, individually or in the alternative in furtherance of common intention of you all, did commit murder by intentionally or knowingly causing the death of Sou.Baby alias Kanchan Sukhdev Patil by threatening her and pouring boiled water on her face and body and thereby committed an offence punishable under section 302 simplicitor or in the alternative under section 302 read with section 34 of the Indian Penal Code and within my cognizance.

That you accused Nos. 1 to 3 above named, on the aforesaid date,

time and place, individually or in the alternative, in furtherance of common intention of you all, knowing that certain offence, to wit murder punishable with death, has been committed, did cause certain evidence of the said offence, to disappear, to wit, you kept the dead body of sou. Baby alias Kanchan Sukhdev Patil in the gunny bag and thrown gunny bag in Vedganga River, with the intention of screening yourself from legal punishment, and thereby committed an offence punishable under section 201 simplicitor or in the alternative under section 201 read with section 34 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried by me on the said charges.

Date: 18.3.1997 Sd/-

3rd Addl. Sessions Judge,
Kolhapur.

The contents of the above charge were read over and explained to the accused in vernacular, thereupon they pleaded not guilty and claimed to be tried.

Date: 18.3.1997 Sd/-

3rd Addl. Sessions Judge,
Kolhapur."

5. We have completely quotes the charge as framed by the learned trial Judge only to point out that the first charge pertains to section 498-A of Indian

Penal Code and is against all the five accused, the second charge specifically states that accused Nos. 1 to 3 above named on 19.8.1995 at about 5.00 a.m. In furtherance of their common intention committed murder of Kanchan and they were therefore charged under section 302 read with section 34 of as also simplicitor section 302.

6. Similar is the case of charge in relation to section 200. Accused Nos. 1 to 3 were said to have caused destruction of evidence as contemplated by section 201 of Indian Penal Code. It is thus evident from the charge itself that accused Nos.4 and 5 were never charged even for offence punishable under section 302 of Indian Penal Code or section 302 read with section 34 of IPC or with section 201 of IPC read with section 34 IPC.

7. The operative part of the order reads thus :

> "The accused Nos.1 to 5 are convicted of the offence punishable under section 302 read with section 34 of I.P.C. and they are sentenced to suffer life imprisonment each and to pay a fine of Rs.1,000/- (Rupees One thousand only) each and in default of payment of fine each of them to suffer further R.I. For 3 (three) months.
>
> The accused Nos.1 to 5 are further found guilty for the offence punishable under section 498A read with section 34 of Indian Penal Code and they are sentenced to suffer R.I. For 3 (three) years each and to pay fine of Rs.1,000/- (Rupees one thousand only) each. In default of

payment of fine each of them to suffer further R.I. For 3 (three) months.

The accused Nos. 1 to 5 are further found guilty of the offence punishable under section 201 read with sec.34 of Indian Penal Code and they are sentenced to suffer R.I. For 3 (three) years each and to pay fine of Rs.1,000/- (Rupees one thousand only) each. In default of payment of fine, each of them to suffer further R.I. For 3 (three) months."

It will thus be seen that the learned trial Judge has chosen to convict the accused under section 302 read with section 34 of Indian Penal Code and 201 read with section 34 of IPC without they being called upon by the charge to that effect. This is gross illegality which a seasoned Additional Sessions Judge is not expected to commit. Nothing more is required to be said except that accused Nos.4 and 5 are liable to be acquitted on both the charges.

8. That takes us to consider as to whether conviction under section 498A of IPC is proper or not or whether conviction of accused Nos. 1 to 3 under section 302 read with section 34 of IPC and section 201 read with section 34 of IPC is proper or not. As already pointed out we have reappreciated the evidence on record which consists of eight witnesses.

9. P.W.1-Ananda Makwane was panch witness to the arrest panchnama of the accused-appellants. He has turned hostile. However fact of the arrest of the accused is not disputed. Similar is the case of P.W.2-Sakubai Rajpur who also was panch to the arrest panchnama and was declared hostile. The fact remains

that accused were arrested. P.W.3-Balasaheb Suryavanshi is panch to the recording of spot panchnama. He also is declared hostile. P.W.4-Sukhadev Patil is the second witness for that spot panchnama and he is also hostile. It will thus further be seen that the prosecution has failed to prove that the accused were arrested or that spot panchnama as alleged by the prosecution was prepared and proved. However the deposition of P.W.8-Investigating Officer can be held adequate to hold that the accused were factually arrested and spot panchnama was factually prepared. That leaves only two witnesses i.e. P.W.5-Vishnu Ghatage and P.W.6-Krishna Ghatage the father and uncle of the deceased respectively. Their' sis the only evidence regarding any torture, ill treatment, cruelty for dowry as also for commission of murder. P.W.5-Vishnu is father of the victim. He has very categorically deposed that after six months of the marriage she was tortured by her in-laws, who tortured her, in what manner and when is kept vague. They he mentions about demand of Rs.20,000/- to purchase motorcycle. According to the witness this demand was made to Kanchan sometime prior to Nagpanchami festival, when was that festival, in what year is not proved. He has said then that accused Sukhdev i.e. Husband of Kanchan took back Kanchan saying that Vishnu P.W.5 father of the victim should not come to the house of the accused No.1 to see his daughter i.e. Deceased Kanchan until he pays Rs.20,000/-. There is thus not even a whisper as to the manner in which Kanchan was tortured by any of the accused persons.

In para 3 the witness goes to say that from Nagpanchami till date of death Kanchan nobody from his house went to the house of Kanchan to see her. Then in para 4 how body was discovered is narrated. Then in paras 5, 6 and 7 he narrates how the complaint was lodged and the matter was referred to Kagal police station. That is his examination in chief. This nowhere discloses with any certainty when was the torture meted out and how it was effected and except for a vague allegation that prior to Nagpanchmi Rs.20,000/- were demanded there is no other demand nor any other evidence to that effect.

10. To the same effect is the testimony of P.W.6-Krishna uncle of the deceased. He does not give any details of ill treatment, he does not give any details of approximate time when the ill treatment was meted out but only speaks of demand of Rs.20,000/- once and then narrates how the body was discovered, how complaint was lodged and how the prosecution was launched. This is the totality of the evidence on the basis of which the learned trial Judge has chosen to convict the appellants.

11. Even if the entire evidence is accepted as true there is no evidence of any torture, there is no evidence except bald statement that demand of Rs.20,000/- was made prior Nagpanchmi festival. The prosecution has not even examined the doctor who conducted the post mortem. Consequently homicidal death of Kanchan also is not proved. All that has been proved is body of Kanchan was found floating in the river on 21.8.1995. It was identified as that of Kanchan by

her and therefore the accused persons were prosecuted. On such flimsy evidence it is impermissible in law to convict any person of the serious offence of murder. There is no evidence whatsoever of common intention to murder, not even charge as regards involvement of accused Nos.4 and 5 and there is no averment whatsoever as regards the demand of dowry or torture by accused 2 and 3 and yet there is conviction of all. We regret to record our dissatisfaction over the manner in which the prosecution was conducted as also the manner in which the learned trial Judge proceeded to convict the accused. In the result therefore appeal succeeds and the same is allowed. The order of conviction and sentence against the accused is set aside. Appellants-accused are on bail. Their bail bonds stand canceled.

12. A copy of this judgment be marked to the Registrar, Special Investigation Department, High Court, Bombay and Shri B.T.Narwade, Additional Sessions Judge wherever he is now posted.